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W.G., Appellant)	
)	
and)	Docket No. 20-1356
)	Issued: December 17, 2021
U.S. POSTAL SERVICE, PITTSBURGH)	
PROCESSING & DISTRIBUTION CENTER,)	
Pittsburgh, PA, Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On June 29, 2020 appellant filed a timely appeal from an April 8, 2020 merit decision and a June 19, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

The issues are: (1) whether appellant has met his burden of proof to establish a left foot condition sustained in the performance of duty on February 19, 2020, as alleged; and (2) whether

² The Board notes that, following the June 19, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 19, 2020 appellant, then a 55-year-old distribution operations supervisor, filed a traumatic injury claim (Form CA-1) alleging that he injured his left foot on that day when he felt a "pop" and instant pain in his foot when walking up two flights of stairs while in the performance of duty. OWCP assigned File No. xxxxxx594.

Appellant had previously sustained a traumatic injury to his left foot on May 4, 2010 when he stepped on uneven pavement, which OWCP accepted for left foot sprain, ankle sprain, and plantar fibromatosis under OWCP File No. xxxxxx569. Under File No. xxxxxx569, OWCP accepted a recurrence of disability, effective March 19, 2013. Appellant returned to limited-duty work on May 20, 2014. On February 24, 2020 he filed a notice of recurrence (Form CA-2a), also under File No. xxxxxx569, alleging that a recurrence of disability occurred on February 19, 2020 due to swelling of the foot, severe pain, and weakness.³

In a development letter dated February 26, 2020, OWCP advised appellant under OWCP File No. xxxxxx594 that additional factual and medical evidence was necessary to establish his claim. It requested that appellant provide medical evidence as to how the alleged employment injury caused or aggravated a medical condition. OWCP also provided a factual questionnaire for appellant's completion. It afforded appellant 30 days to submit the necessary evidence.

On April 8, 2020 OWCP denied appellant's claim for compensation under File No. xxxxxx594, finding that the evidence did not establish that the injury and/or event(s) occurred, as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Appellant requested reconsideration on April 24, 2020. With his request, he submitted a statement of even date in which he responded to OWCP's development letter and described the alleged incident of February 19, 2020. Appellant explained that he had foot pain as a result of a previous injury under OWCP File No. xxxxxx569. While the current claim was a new injury, records from his physicians had been submitted under OWCP File No. xxxxxx569. Appellant also submitted medical evidence dated from February 19 through April 3, 2020.

By decision dated June 19, 2020, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant merit review. It noted that the evidence reviewed in support of the reconsideration request included medical documentation, but that his case was not in posture to review the medical evidence. OWCP found that appellant never responded to the factual questions contained in its development letter. It stated that it appeared that appellant had a preexisting injury, but that he had not explained the situation.

³ OWCP has administratively combined File No. xxxxxx594 and File No. xxxxxx569, with the former serving as the master file.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether fact of injury has been established. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.⁶ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷ An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.⁸

An employee has the burden of establishing the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence.⁹ An injury does not have to be confirmed by eyewitnesses to establish that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.¹⁰ It is well established that a claimant cannot establish fact of injury if there are inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time and place, and in the manner alleged. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.¹¹ However, an

⁴ *E.S.*, Docket No. 18-1580 (issued January 23, 2020); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *A.F.*, Docket No. 18-1154 (issued January 17, 2019); *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, *supra* note 4.

⁷ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *Id.* See *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁹ *J.R.*, Docket No. 18-1079 (issued January 15, 2019); *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

¹⁰ *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

¹¹ *T.A.*, Docket No. 20-1284 (issued January 27, 2021); *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹²

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a left foot condition sustained in the performance of duty on February 19, 2020, as alleged.

When OWCP initially denied appellant's claim on April 8, 2020, appellant had not provided a sufficient description of the time, place, and in the manner of his alleged left foot condition.¹³ On his traumatic injury claim Form CA-1 appellant alleged that on February 19, 2020 he sustained a left foot condition on that date when he felt a "pop" and instant pain in his foot when walking up two flights of stairs while in the performance of duty.

In a development letter dated February 26, 2020, OWCP advised appellant that additional factual and medical evidence was necessary to establish his claim. It requested that appellant provide medical evidence as to how the alleged employment injury caused or aggravated a medical condition. OWCP afforded appellant 30 days to submit the necessary evidence and return a factual questionnaire for appellant's completion. Appellant did not respond prior to the issuance of the April 8, 2020 decision. There are no specific details on his CA-1 form regarding how the alleged injury occurred.¹⁴ As such, the Board finds that appellant did not establish that the February 19, 2020 incident occurred in the performance of duty, as alleged. Consequently, it is unnecessary for the Board to address the medical evidence of record.¹⁵

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹⁷ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹⁸

¹² See *M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

¹³ *J.R.*, *supra* note 9; *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

¹⁴ See *J.R.*, *id.*; *S.A.*, Docket No. 18-0508 (issued July 10, 2018).

¹⁵ See *M.P.*, Docket No. 15-0952 (issued July 23, 2015); *Alvin V. Gadd*, 57 ECAB 172 (2005).

¹⁶ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his] own motion or on application." 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. § 10.607.

¹⁸ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁹ When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.²⁰

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision with regard to OWCP's denial of reconsideration on June 19, 2020.

OWCP denied appellant's claim on April 8, 2020, finding that he had not met the factual burden of proof in his claim. On reconsideration appellant submitted a statement dated April 24, 2020 in which he responded to OWCP's development letter and described the incident of February 19, 2020, noting that he had prior foot pain as a result of a previous injury under OWCP File No. xxxxxx569. He stated that, while the current claim was a new injury, records from his physicians were located under OWCP File No. xxxxxx569.

On June 19, 2020 OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant review of its prior decision. It found that appellant never responded to the factual questions contained in its development letter. OWCP stated that it appeared that appellant had a preexisting injury, but that he had not explained the situation.

The Board, having duly considered the matter, notes that in denying appellant's request for reconsideration, OWCP did not address or indicate awareness of appellant's April 24, 2020 factual statement replying to inquiries contained in its development letter. Thus, the Board finds that this case is not in posture for decision.²¹

In the case of *William A. Couch*,²² the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

In its June 19, 2020 decision, OWCP denied appellant's request for reconsideration, finding that he failed to respond to the factual questions contained in the development letter. As

¹⁹ *Id.* at § 10.606(b)(3).

²⁰ *Id.* at § 10.608(a), (b).

²¹ See *A.C.*, Docket No. 20-0917 (issued January 27, 2021); *K.F.*, Docket No. 19-0888 (issued January 2, 2020); *J.J.*, Docket No. 13-1666 (issued August 18, 2014).

²² 41 ECAB 548, 553 (1990).

it did not reference or address appellant's factual response to the development letter, it failed to follow its own procedures by properly discussing the relevant evidence of record.²³

Inasmuch as the Board's decisions are final as to the subject matter appealed, it is crucial that OWCP address all relevant evidence properly submitted to OWCP prior to the issuance of its decision.²⁴

For this reason, the case will be remanded to OWCP to enable it to properly consider all of the evidence submitted prior to the issuance of its June 19, 2020 nonmerit decision, including evidence contained under the combined case files. Following such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a left foot condition sustained in the performance of duty on November 26, 2019, as alleged. The Board further finds that this case is not in posture for decision as to whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²³ All evidence submitted should be reviewed and discussed in the decision. Evidence received following development that lacks probative value should also be acknowledged. Whenever possible, the evidence should be referenced by author and date. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.5(b)(2) (November 2012).

²⁴ 20 C.F.R. § 501.6(d); *supra* note 22; *see also* A.V., Docket No. 20-1251 (issued January 28, 2021).

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2020 decision of the Office of Workers' Compensation Programs is affirmed. The June 19, 2020 decision is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 17, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board